

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, EX
REL. MICHAEL STEWART,
Plaintiff,

-vs-

ALTECH SERVICES, INC., an
Oklahoma corporation, and THOMAS
WANDER and JANE DOE WANDER,

Defendants.

NO. CV-07-0213-LRS

**ORDER GRANTING MOTION FOR
EXTENSION OF TIME AND DENYING
MOTION TO DISMISS**

BEFORE THE COURT is the Plaintiffs' Motion to Continue and to Amend Scheduling Order, Ct. Rec. 34, and Defendants' Motion to Dismiss Thomas Wander and Jane Doe Wander, Ct. Rec. 37, both motions being filed on September 27, 2010 and noted without oral argument for October 29, 2010.

I. BRIEF BACKGROUND

Plaintiff, Michael Stewart, brought this present action under 31 U.S.C. §3729, False Claims Against the United States. The Original Complaint against Altech Services, Inc. was filed on July 3, 2007 (Ct. Recs. 1-3). That Complaint was sealed by this Court pursuant to 31 U.S.C. §3730 (2) while the government conducted its review. The Government declined to proceed with the case against Altech Services, Inc. and on January 20, 2010 Defendant, Altech, filed its answer in this matter

1 and the case commenced (Ct. Rec. 21). On September 22, 2009, Plaintiff
2 Michael Stewart amended his complaint to add personally named Defendants,
3 Thomas Wander and Jane Doe Wander, to the suit (Ct. Rec. 18). Mr. and
4 Mrs. Wander were served on August 22, 2010 in Oklahoma.

5 **A. MOTION TO CONTINUE**

6 Plaintiff Relator Michael Stewart asserts that he is taking his
7 obligation to represent the government's interests seriously. However,
8 in order to do so, Mr. Stewart indicates it has taken more time than
9 anticipated gather and process the information on this very complex
10 claim. Because progress has been slower than expected, Plaintiff is
11 asking for a twelve month continuance. Initially, Defendants opposed
12 the continuance, but has since withdrawn the objection. The Court
13 herein finds good cause to grant the continuance.

14 **B. MOTION TO DISMISS**

15 Defendants, Thomas and Jane Doe Wander, now move this Court to
16 dismiss this action against them pursuant to Fed.R.Civ.P. 12(b)(1) and
17 (2) alleging lack of subject matter jurisdiction and lack of personal
18 jurisdiction. More specifically, Defendants argue that Plaintiff has
19 attempted to initiate a new lawsuit against a new, originally unnamed
20 party by adding Defendant(s) without following the applicable statute.
21 To allow the Plaintiff to add additional Defendants which amounts to
22 initiating a new case, without properly adhering to the requirements
23 of the statute 31 U.S.C. §3729 et.seq. By amending its Complaint,
24 Defendants argue, Plaintiff removes the protection of the Government
25 investigation from the process which the statute is intended to
26 provide.

1 Plaintiff responds that in *United States ex rel. Lujan v. Hughes*
2 *Aircraft Co.*, 67 F.3d 242, 245 (9th Cir.1995), the Ninth Circuit held
3 that the False Claims Act does not contain a provision that authorizes
4 dismissal as a sanction for disclosures in violation of the seal
5 requirement. Plaintiff cites *Lujan* as establishing the principle that
6 the sealing "requirements of § 3730(b)(2) are not jurisdictional, and
7 violation of those requirements does not per se require dismissal of
8 the qui tam complaint."

9 Plaintiff likens the instant case to *United States ex rel. Branch*
10 *Consultants, L.L.C. v. Allstate Ins.*, 668 F. Supp. 2d 780,803, (E.D.
11 La. 2009). Plaintiff explains that the Relator's first complaint
12 pleads the conduct of Altech and the underlying facts resulting in the
13 false claims action. Plaintiff argues Stewart properly filed the
14 action under seal and brought the false claims to the attention of the
15 government. The government met with Stewart who described in detail
16 the false claims and following a lengthy period of investigation, the
17 government elected to allow Stewart to pursue the case. Plaintiff
18 asserts that the addition of Thomas Wander as a defendant does not
19 present any new information or additional allegations of misconduct
20 and as such, the government was not prejudiced by the amended
21 complaint. Plaintiff concludes that Stewart complied with the
22 requirements under 31 U.S.C. §3730 and did not violate the statute by
23 filing an amended complaint. Plaintiff concludes that 31 U.S.C. §3730
24 is not jurisdictional and it merely safeguards the government's right
25 to intervene in any false claim action.

1 In reply, Defendants argue that the instant case involves a
2 situation where a party was added who was not properly before the
3 court when the complaint was sealed and being reviewed by the
4 Government. This fact sets it apart from cases cited by Plaintiff
5 allowing an amended complaint adding claims to parties already
6 properly before the court. Defendants explain that the interests that
7 must be balanced are: 1) to encourage more of this private litigation;
8 while 2) still allowing the Government to fully evaluate the claims.
9 Defendants argue that the Government cannot fully evaluate these types
10 of claims when the proper defendants are not involved in the process.

11 The Court finds that failure to comply with the seal provisions
12 of § 3730(b)(2) are not jurisdictional, and violation of those
13 requirements does not per se require dismissal of the qui tam
14 complaint. *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242
15 (9th Cir. 1995). No provision of the False Claims Act explicitly
16 authorizes dismissal as a sanction for disclosures in violation of the
17 seal requirement. Further, the Court finds defendants' argument lacks
18 merit because by its terms, § 3730(b)(2) applies only to the complaint
19 and not to any amended complaint. *See Wisz ex rel. U.S. v. C/HCA*
20 *Development, Inc.*, 31 F.Supp.2d 1068, 1068-69 (N.D.Ill.1998). In *U.S.*
21 *ex rel. Milam v. Regents of University of California*, 912 F.Supp. 868,
22 889-90 (D.Md.1995), the relator's amended complaint added defendants
23 but was not filed under seal or in camera. The *Milam* court rejected
24 the defendant's argument that plaintiff failed to comply with §
25 3730(b)(2) and held that "[the relator] followed the requirements of §
26 3730(b)(2) when filing the initial complaint. Neither the statute nor

1 any relevant case law imposed upon [the relator] the duty to file any
2 amendments to that complaint in camera and under seal." *Id.* at 890.

3 **II. CONCLUSION**

4 This Court does not find appropriate authority, given the facts
5 presently before the Court, to dismiss the defendants Thomas Wander
6 and Jane Doe Wander named in the amended complaint. The Court takes
7 into account the unopposed requested year-long continuance,
8 defendants' failure to demonstrate undue hardship, actual harm or
9 prejudice to the government caused by Plaintiff's failure to seal the
10 amended complaint, and absence of bad faith or willfulness on the part
11 of Plaintiff. The addition of Thomas Wander as a defendant does not
12 present any new information or additional allegations of misconduct
13 and as such the Court denies Defendants' motion to dismiss.

14 Accordingly,

15 **IT IS ORDERED** that:

16 1. The Plaintiffs' Motion to Continue and to Amend Scheduling
17 Order, **Ct. Rec. 34**, is **GRANTED**. Although Defendants initially opposed
18 the motion, their objection was withdrawn on October 29, 2010 (Ct.
19 Rec. 50). The motion requests that the currently scheduled trial be
20 continued. The currently scheduled trial date of March 14, 2011 is
21 **VACATED**. The parties are directed to submit a Joint Status
22 Certificate indicating agreed upon new dates for trial and other
23 deadlines the parties desire to continue. After the Court receives
24 the Joint Status Certificate it will set a telephonic scheduling
25 conference.

2. Defendants' Motion to Dismiss Thomas Wander and Jane Doe Wander, **Ct. Rec. 37**, is **DENIED**.

The District Court Executive is directed to file this Order and provide copies to counsel and pro se Defendant.

DATED this 18th day of November, 2010.

s/Lonny R. Suko

LONNY R. SUKO
CHIEF UNITED STATES DISTRICT JUDGE